Supreme Court, U.S.
FILED
06-447 SEP 25 2006
OFFICE OF THE CLERK

No. ___

IN THE
SUPREME COURT OF THE UNITED STATES

NAZIR CHAUDHARY AND DOGWOOD REALTY, INC.,
Petitioners,

v.

CAROLYNNE H. STEVENS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY, ANGELA ROGERS-REAVES, INDIVIDUALLY AND IN HER OFFICIAL CAPCITY, DENYCE BONAPARTE, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AND THE COMMONWEALTH OF VIRGINIA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Thomas H. Roberts
Counsel of Record
Thomas H. Roberts & Associates, P.C.
105 South 1st Street
Richmond, Virginia 23219
Telephone: (804) 783-2000
Attorney for Petitioners

QUESTIONS PRESENTED

Whether the thirty day limitation for removal under 28 U.S.C. § 1441(e) begins to run when defendants were served with the plaintiff's complaint which rested upon a federal right and thus presented a federal 'claim or right' as set forth in 28 U.S.C. § 1441(b) and articulated by the First Circuit in *Hernandez-Agosto v. Romero-Barcelo*, 748 F.2d 1, 2 (1st Cir. 1984) and *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983).

Whether to allege ongoing retaliation, a plaintiff must allege more than "a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief the pleader seeks." Fed. Rule Civ. Pro. 8(a). *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 122 L. Ed. 2d 517, 507 U.S. 163, 113 S. Ct. 1160 (1993). *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002).

PARTIES TO THE PROCEEDINGS

Petitioners are Nazir Chaudhary and Dogwood Realty, Inc.

Respondents are Carolynne H. Stevens, Angela Rodgers-Reaves, DeNyce Bonaparte, in their individual and official capacities as employees of the Department of Social Services for the Commonwealth of Virginia, and the Commonwealth of Virginia.

CORPORATE DISCLOSURE

Pursuant to Rule 29.6, Petitioners state as follows:

Dogwood Realty, Inc. is privately held and there is no parent or publicly held company owning 10% or more of the corporation's stock, now does it have parents, trusts, subsidiaries and/or affiliates of said party that have issued shares or debt securities to the public.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Corporate Disclosure iii

Table of Contents iv

Table of Cited Authorities vi

Table of Appendices viii

Petition for Writ Of Certiorari 1

Opinion Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 6

Reasons for Granting the Writ 7

I. The Fourth Circuit's Opinion Directly Conflicts With the First Circuit's Ruling in *Hernandez-Agosto v. Romero-Barcelo*, 748 F.2d 1, 2 (1st Cir. 1984) And Is Contrary To The Express Language Of 28 U.S.C. § 1446 Authorizing Removal

For A Civil Action Founded On A "Right Arising Under The Constitution" Focusing Instead Upon A "Claim" Only. 7

II. Plaintiffs' Complaint Alleged Ongoing Retaliation, With "A Short And Plain Statement Of The Claim Showing That The Pleader Is Entitled To Relief And A Demand For Judgment For The Relief The Pleader Seeks" In Accordance With The Requirements Of Fed. Rule Civ. Pro. 8(a) and The Decisions Of The United States Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 122 L. Ed. 2d 517, 507 U.S. 163, 113 S. Ct. 1160 (1993) and *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002) And Therefore Should Not Have Been Dismissed On The Rule 12(b)(6) Motion. 10

Conclusion 11

Appendix 1A

TABLE OF AUTHORITIES

Cases

Dardeau v. West Orange-Grove Consolidated I.S.D., 43 F. Supp. 2d 722 (E.D. Tex. 1999).....8

Estate Const. Co. v. Miller & Smith Holding Co., 14 F.3d 213 (4th Cir. 1994) 8

Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983).....7

Hernandez-Agosto v. Romero-Barcelo, 748 F.2d 1 (1st Cir. 1984).....7, 8

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 113 S. Ct. 1160, 122 L.Ed. 2d 517 (1993). 10, 11

Rossello-Gonzalez v. Calderon-Serra, 398 F.3d 1 (1st Cir. 2004).....8

Swierkiewicz v. Sorema N. A., 534 U.S. 506, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002).....10, 11

Town of Castle Rock v. Gonzales, 545 U.S. 748, 125 S. Ct. 2796, 162, L.Ed.2d 657 (2005).....10

Statute and Rules

United States Constitution, Amendment 1.....2, 6, 9

28 U.S.C. § 1254(1).....2

28 U.S.C. § 1441.....2, 7, 8, 10

28 U.S.C. § 1446.....4, 6, 7

42 U.S.C. § 1983 .....5, 6, 9

Fed. Rule Civ. Pro. 8(a).....4, 10, 11

TABLE OF APPENDICES

Appendix A – 4th Circuit Rejection of Rehearing.....1A

Appendix B – 4th Circuit Affirming District Court.....3A

Appendix C – District Court Opinion.....5A

Appendix D – Magistrate Report and Recommendation 10A

Appendix E – State Motion For Judgment 24A

Appendix F – 28 U.S.C. § 1446.....30A

PETITION FOR WRIT OF CERTIORARI

Nazier Chaudhary ("Chaudhary") and Dogwood Realty, Inc. ("Dogwood") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 24, 2006, in order to resolve the conflict between the First Circuit and Fourth Circuit Court of Appeals on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit that gives rise to this petition is unpublished by order of the Fourth Circuit, 2006 U.S. App. LEXIS 12916. It is reprinted in Appendix B hereto at page 3A. By order filed June 27, 2006, the Fourth Circuit denied the petition for rehearing and petition for rehearing en banc. Appendix. A at page 1A. The United States District Court Opinion affirming the Report and Recommendation of the Magistrate Judge is set forth in Appendix C at page 5A and Appendix D at page 10A. The Report and Recommendation is published at 2005 U.S. Dist. LEXIS 27447.

JURISDICTION

On September 7, 2005, the United States District Court for the Eastern District of Virginia issued a decision adopting the August 9, 2005 Report and Recommendation of

the Magistrate Judge granting the defendants Rule 12(b)(6) motion to dismiss and denying the plaintiffs motion to remand. On October 6, 2005, Plaintiffs timely filed a notice of appeal to the Fourth Circuit Court of Appeals. On June 27, 2006, the Fourth Circuit denied plaintiffs' timely-filed motion for rehearing and motion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

28 U.S.C. § 1441(a)(b) & (e) provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States

for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(e)
(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—
(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.
The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of

the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

28 U.S.C. § 1446(b)

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

Fed. Rule Civ. Pro. 8(a), as amended, provides:

(a) Claims for Relief.

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the

grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

42. U.S.C. § 1983

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Defendants filed their notice of removal on June 2, 2005, nearly three years after the suit was filed and two years after being served with a suit founded on a right arising under the Constitution of the United States. On June 22, 2005, plaintiffs filed a timely motion to remand. The suit as originally filed on December 6, 2002 in the Circuit Court for the City of Richmond, Virginia alleged that "Defendants retaliated against plaintiffs for the exercise of ...federally protected First Amendment Speech" and sought relief under Count 3 entitled "CIVIL RIGHTS VIOLATION" separate from the relief sought for violation of the Virginia Constitution in Count 4 entitled "VIRGINIA ARTICLE 1 § 12 CIVIL RIGHTS VIOLATION. The suit also alleged ongoing retaliation. On October 7, 2005, the district court adopted the Report and Recommendations of the Magistrate, denying the motion to remand and dismissing the plaintiffs' action. The court ignored the express language of 28 U.S.C. § 1446 authorizing removal for a civil action founded on a "right arising under the Constitution" focusing instead upon a "claim" only. The removal notice was filed within 30 days of an amended complaint expressly referenced "28 U.S.C. § 1983" which provides a civil remedy for deprivation of any rights, privileges, or immunities secured by the Constitution and laws under color of state law.

The district court dismissed the action erroneously applying the doctrine of *res judicata* by ignoring the claim of ongoing retaliation and relying upon an earlier suit by plaintiffs in which Chaudhary was dismissed for lack of standing to bring claims related to Dogwood Realty, Inc.

The Fourth Circuit affirmed the district court's decision on May 24, 2006, by a per curiam opinion, and rejected the petition to rehear and to rehear in banc on June 27, 2006.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Opinion Directly Conflicts With the First Circuit's Ruling in *Hernandez-Agosto v. Romero-Barcelo*, 748 F.2d 1, 2 (1st Cir. 1984) And Is Contrary To The Express Language Of 28 U.S.C. § 1446 Authorizing Removal For A Civil Action Founded On A "Right Arising Under The Constitution" Focusing Instead Upon A "Claim" Only.

The decisions below failed to address or distinguish *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)(A district court's federal question jurisdiction extends over ". . . only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law," in that "federal law is a necessary element of one of the well-pleaded state claims, or that [the] claim is 'really' one of federal law.")

The courts below accepted defendants clouded arguments focused strictly on a "claim" but ignored the "right arising under the Constitution...." under 28 U.S.C. 1441(b)

Neither the lower court nor the Fourth Circuit addressed the conjunctive "or" of 28 U.S.C. § 1441(a). A defendant in a civil action brought in state court may remove the action to federal court if "the district courts of the United States have original jurisdiction . . . ." 28 U.S.C. § 1441(a), which includes, of course, actions "founded on a claim **or right** arising under the Constitution, treaties or laws of the United States . . . ." 28 U.S.C. § 1441(b).(emphasis added).

The Fourth Circuit, the district court and defendants did not distinguish or even address *Hernandez-Agosto v. Romero-Barcelo*, 748 F.2d 1, 2 (1st Cir. 1984). ("The Supreme Court of the United States has made clear that, in deciding (for removal purposes) whether a case presents a federal 'claim or right,' a court is to ask whether the plaintiff's claim to relief rests upon a federal **right**, and the court is to look only to plaintiff's complaint to find the answer.")(emphasis added). Nor was *Rossello-Gonzalez v. Calderon-Serra*, 398 F.3d 1, 10 (1st Cir. 2004) addressed by the court. The Fourth Circuit, the district court and defendants did not seek to distinguish the careful analysis employed by *Dardeau v. West Orange-Grove Consolidated I.S.D.*, 43 F. Supp. 2d 722 (E.D. Tex. 1999), also cited by plaintiffs. The Fourth Circuit, the district court and defendants did not even attempt to distinguish or refute the reasoning of the Fourth Circuit in *Estate Const. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213 (4th Cir. 1994), (a case ought not to be dismissed unless it is apparent that the plaintiff "would not be entitled to relief under any facts which could be proved in support of [his] claim[s]." *Id.* at 218(analysis of Rule 12(b)(6) motion)).

Before the Fourth Circuit, the defendants successfully obscured their failure to timely remove the case by substituting the actual allegations of the state pleadings by such ambiguous terms as "something" and "unidentified legal basis" in the place of the expressly alleged "retaliation" "for the exercise of ...federally protected First Amendment Speech."

As adopted by the Fourth Circuit, the district court and the Magistrate before them, defendants suggested that paragraph 12 of the First Amended Motion for Judgment[1] undercut the argument that the initial pleading sufficiently stated a removable claim. The premise of such an argument is flawed and the logic is circular. The argument assumes that the addition of paragraph 12 was necessary. When defendants assume the addition of paragraph 12 was necessary, they then argue that the inclusion of paragraph 12 therefore proves that its inclusion was necessary. Further, such an assertion by the defendants is incredulous–that prior to reading paragraph 12, a concise treatise of law, defendants were unaware that "claims for the civil rights violation of the First Amendment to the United States Constitution [are] actionable under 42 U.S.C. § 1983 with damages, injunctive relief and attorneys fees under 42 U.S.C. § 1981."

---

[1] ¶ 12 of the Amended Motion for Judgment: "The retaliation by defendants give rise to plaintiffs' claims for the civil rights violation of the First Amendment to the United States Constitution actionable under 42 U.S.C. § 1983 with damages, injunctive relief and attorneys fees under 42 U.S.C. § 1981."

The notice of removal was filed almost two years after defendants received the initial complaint containing grounds for removal. The notice of removal was filed too late. The case should have been remanded to state court.

The panel's decision is in conflict with the decisions and analysis used by the United States Supreme Court, the First Circuit and the District Court in Texas as well as the plain language of 28 U.S.C. § 1441(b).

II. Plaintiffs' Complaint Alleged Ongoing Retaliation, With "A Short And Plain Statement Of The Claim Showing That The Pleader Is Entitled To Relief And A Demand For Judgment For The Relief The Pleader Seeks" In Accordance With The Requirements Of Fed. Rule Civ. Pro. 8(a) and The Decisions Of The United States Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 122 L. Ed. 2d 517, 507 U.S. 163, 113 S. Ct. 1160 (1993) and *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002) And Therefore Should Not Have Been Dismissed On The Rule 12(b)(6) Motion.

In May of 2005, plaintiffs alleged in paragraph 4 of the First Amended Motion for Judgment, "The retaliation is ongoing." The panel's decision is in conflict with the well established law, that the facts as alleged must be considered true. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2800 (U.S. 2005) *citing Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002).

In state court, if defendants wanted a more definitive statement, the defendants could have moved for a bill of

particulars or simply obtained the information through discovery. Similarly, in federal court, Fed. Rule of Civ. Pro. 8 clearly states that the pleading setting forth a claim for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief the pleader seeks." Fed. Rule Civ. Pro. 8(a). The averment of the pleading shall be "simple, concise, and direct." Fed. Rule Civ. Pro. 8(e). No more technical form of pleading is required by Rule 8(e). The decisions conflict with Fed. Rule Civ. Pro. 8 and the decisions of the United States Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 122 L. Ed. 2d 517, 507 U.S. 163, 113 S. Ct. 1160 (1993) and *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Thomas H. Roberts, Esquire
Counsel of Record
Thomas H. Roberts & Associates, P.C.
105 South 1st Street
Richmond, Virginia 23219
Telephone: (804) 783-2000
Facsimile: (804) 783-2105
Attorney for Petitioners

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND FILED JUNE 27, 2006

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT
FILED June 27, 2006

No. 05-2123
CA-05-382-3

NAZIR CHAUDHARY; DOGWOOD REALTY, INCORPORATED
Plaintiffs - Appellants

v.

CAROLYNNE H. STEVENS, Individually and in her official capacity; ANGELA ROGERS-REAVES, Individually and in her official capacity; DENYCE BONAPARTE, Individually and in her official capacity; COMMONWEALTH OF VIRGINIA
Defendants - Appellees

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge King and Senior Judge Hamilton. Judge Luttig was a member of the original panel but did not participate in this decision. This order is filed by a quorum of the panel pursuant to 28 U.S.C. Section 46(d).

For the Court,
/s/ Patricia S. Connor
CLERK

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND FILED MAY 24, 2006

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 05-2123

NAZIR CHAUDHARY; DOGWOOD REALTY, INCORPORATED,
Plaintiffs - Appellants,
versus

CAROLYNNE H. STEVENS, Individually and in her official capacity; ANGELA ROGERS-REAVES, Individually and in her official capacity; DENYCE BONAPARTE, Individually and in her official capacity; COMMONWEALTH OF VIRGINIA,
Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, District Judge. (CA-05-382-3)

Submitted: April 26, 2006 Decided: May 24, 2006.

Before LUTTIG[2] and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Thomas H. Roberts, THOMAS H. ROBERTS & ASSOCIATES, P.C., Richmond, Virginia, for Appellants. Judith Williams Jagdmann, Attorney General of Virginia, William E. Thro, State Solicitor General, David E. Johnson, Deputy Attorney General, Kim F. Piner, Senior Assistant Attorney General, Allen T. Wilson, Special Counsel, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Nazir Chaudhary and Dogwood Realty appeal the district court's order accepting the recommendation of the magistrate judge, denying their motion to remand and granting defendants' motion to dismiss. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See Chaudhary v. Stevens, No. CA-05-382-3 (E.D. Va. Sept. 7, 2005). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

---

[2] Judge Luttig was a member of the original panel but did not participate in this decision. The opinion is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

APPENDIX C

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA DATED AND FILED SEPTEMBER 7, 2005

NAZIER CHAUDHARY, et al.,
Plaintiffs,

Civil Action No.

3:05CV382-HEH

CAROLYNNE H STEVENS, et al.,
Defendants.

FINAL OPINION

(Adopting the Report and Recommendation of the United States Magistrate Judge, Denying Plaintiffs' Motion for Remand and Granting Defendants' Motion to Dismiss)

THIS MATTER is before the Court on a Report and Recommendation ("R&R"), pursuant to 28 D.S.C. § 636(b)(1)(B), filed by the Honorable Dennis W. Donhal, United States Magistrate Judge ("Magistrate Judge"), on August 9, 2005, to which Plaintiffs have filed objections. Because the issues are adequately addressed in the briefs, and oral argument would not materially aid the Court in the decisional process, no oral argument is necessary at this time.

Having reviewed both the record and the R&R in this case as well as the objections filed, this Court finds that there

is substantial justification in the record to support the Magistrate Judge's findings of fact and conclusions of law.

Plaintiffs have filed a number of objections to the Magistrate Judge's R&R. The core of the Plaintiffs' objections are based on two findings by the Magistrate Judge. The first is the Magistrate Judge's finding that the initial Motion for Judgment, filed in state court, lacked a clear statement of law or facts from which the Defendants could determine if the case was subject to removal pursuant to 28 U.S.C. § 1446. The second is based on the Magistrate Judge's finding that the Plaintiffs' suit is barred by the principle of *res judicata.*

Plaintiffs' original Motion for Judgment filed on December 6, 2002, contained three counts based on state law grounds and one count entitled simply "Civil Rights Violation". (Mot. For J. ¶ 16). The only support for the latter count comes from paragraph eleven (11) of the Motion for Judgment which states, "Defendants retaliated against Plaintiffs for the exercise of state and federally protected First Amendment Speech. . . ." The Plaintiffs' failure to state clearly and concisely the grounds on which they sought relief compelled the Defendants' to file a Bill of Particulars seeking clarification. It was not until Plaintiffs' filed the First Amended Motion for Judgment, on May 19, 2005, that it became clear they were seeking relief pursuant to 42 U.S.C. § 1983. In response, Defendants promptly filed their Notice of Removal on May 24,2005, based on the § 1983 claim. Plaintiffs thereupon filed a Motion to Remand, claiming that removal was improper due to the lengthy delay from the original filing date. *See* 28 U.S.C. § 1446.

As discussed in the R&R, removal of a civil action from state to federal court must be done in accordance with 28 U.S.C. § 1446. This statute plainly states that the notice of removal must be filed within thirty (30) days after the defendant receives a copy of the initial pleading. 28 U.S.C. § 1446(a). The statute also advises, "[i]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, ... of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which has become removable. . . ." *Id.* § 1446(b).

The Court concurs with the Magistrate Judge's finding that Plaintiffs' Motion for Judgment lacked a clear statement of law and facts from which the Defendant could determine if the case was removable. Thus, the case could not be removed until the Plaintiffs filed the First Amended Motion for Judgment clearly stating they sought relief under 42 U.S.C. § 1983. As a result, the Defendants' notice of removal was timely, because it was filed within thirty (30) days of the Amended Motion for Judgment.

This Court also finds no error with the Magistrate Judge's conclusion that the Plaintiffs' case is barred by the principle of *res judicata.* A claim is barred under the doctrine of *res judicata* if:

> 1. the prior judgment was final and on the merits, and rendered by a court of competent jurisdiction in accordance with the requirements of due process;
>
> 2. the parties are identical, or in privity, in two actions; and

> 3. the claims in the second matter are based upon the same cause of action involved in the earlier proceeding.

Pittston Co. v. United States, 199 F.3d 694,704 (4th Cir. 1999) (citing *In re Varat Enters.,* 81 F.3d 1310, 1315 (4th Cir. 1996)).

The present case is almost identical to a previous suit brought by the Plaintiffs in *Dogwood Realty, Inc.* v. *Goodwin,* No. 3:03cv271 (E.D. Va. Nov. 2 2004) *(currently on appeal).* The only substantive difference between *Dogwood* and the present case, is the fact that in the previous case the Plaintiff used the same facts to assert a Fourteenth Amendment claim under §1983, and in the current case the Plaintiff has cast the facts as a First Amendment claim. In both cases the Plaintiff is basing his claim on identical facts, requesting the same relief, and the parties are identical or in privity with the parties in the previous suit. The Plaintiff can not defeat the doctrine of *res judicata* merely by resurrecting his previous suit in the guise of a First Amendment claim.

Accordingly, this Court HEREBY ACCEPTS and ADOPTS the August 9, 2005, Report and Recommendation of the Magistrate Judge. In accordance with that Report and Recommendation, the Court HEREBY DENIES Plaintiff Motion to Remand and GRANTS Defendants Motion to Dismiss.

The Clerk is directed to TERMINATE this case from the Court's docket.

The Clerk is directed to send a copy of this Order to Plaintiff and to all counsel of record.

It is so ORDERED.

/s/ Henry E. Hudson
United States District Judge

Date: September 7, 2005
Richmond, VA

APPENDIX D

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE FOR THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA DATED AND FILED AUGUST 9, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

NAZIR CHAUDHARY, et al.,
Plaintiffs,
v. Civil Action No. 3:05CV382

CAROLYNNE H. STEVENS, et al.,
Defendants.

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

This matter is before the court pursuant to *28 U.S.C. § 636(b)(1)(B)* for a report and recommendation on Plaintiffs' motion to remand the case that had been removed from state court and a motion to dismiss submitted by Defendants. The court's federal question jurisdiction is properly invoked under *42 U.S.C. § 1983*, *28 U.S.C. § 1331*, and the *First Amendment of the United States Constitution*. (First Am. Mot. for J. (Compl.) P12). Plaintiffs have demanded money damages and "any other relief that is appropriate." (Id. at P41). Plaintiffs' motion to remand the case to state court is based on the Defendants' alleged failure to file the required notice of removal within the prescribed time limit. Defendants move to dismiss the Complaint in its entirety for

what is asserted to be lack of subject matter jurisdiction and Plaintiffs' failure to state a claim on which relief can be granted. *Fed. R. Civ. P. 12(b)(1) & (6).*

The Complaint is comprised of three counts against each of three employees of the Virginia Department of Social Services (DSS) in both their official and individual capacities. Plaintiffs are an individual, Nazir Chaudhary, and Dogwood Realty, Inc. (Dogwood), a real estate corporation wholly owned by Chaudhary. Plaintiffs allege essentially that DSS employees discriminated against them by denying and revoking state licenses required to operate certain nursing home facilities owned and operated by Dogwood in retaliation ". . . for the exercise of state and federally protected *First Amendment* Speech, and for petitioning the government." (Compl. PP3, 12). The named Defendants are Carolynne Stevens, individually and in her capacity as the Director of the DSS Licensing Division; Angela Rodgers-Reaves, individually and in her capacity as a DSS Licensing Inspector; and DeNyce Bonaparte, individually and in her capacity as a Licensing Administrator for the DSS Licensing Division.

Standard of Review

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* is properly granted when, accepting as true all non-conclusory factual allegations in the complaint and drawing all reasonable inferences in favor of the non-moving party, the plaintiff can prove no set of facts upon which relief may be granted. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*; *Johnson v. Mueller, 415 F.2d 354 (4th Cir. 1969).* At the same time, competing versions of the facts are the very basis for lawsuits and are therefore an insufficient basis for resolution on a motion to dismiss under

Fed. R. Civ. P. 12(b)(6). See Trulock v. Freeh, 275 F.3d 391, 405 (4th Cir. 2001). In the context of a civil rights complaint, the court "'must be especially solicitous of the wrongs alleged' and 'must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief *under any legal theory which might plausibly be suggested by the facts alleged.*'" *Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999)(quoting Harrison v. United States Postal Serv., 840 F.2d 1149, 1152 (4th Cir. 1988)*(emphasis in original). Under the governing Federal Rules of Civil Procedure, a complaint must only contain a short and plain statement to give the defendants fair notice of the claims against them. *Fed. R. Civ. P. 8.* It makes no difference under what heading or where in the complaint the factual allegations appear: "all pleadings shall be so construed as to do substantial justice" and should not be dismissed even if recovery seems unlikely. *Swierkiewicz v. Sorema, 534 U.S. 506, 514-515, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).*

Procedural History

The Plaintiffs filed their first Motion for Judgment in state court on December 6, 2002. Count III, entitled "Civil Rights Violation," contained two paragraphs, one encompassing the first thirteen paragraphs of the pleading, and another demanding judgment. (P16). On March 25, 2003, the Defendants filed a Motion for Bill of Particulars, requesting, among other things, a clarification of the cause of action in Count III of the Motion for Judgment. (Mot. for Bill of Particulars P5). On February 16, 2005, Plaintiffs submitted Plaintiffs' First Interrogatories and Production of Documents to the Defendant Commonwealth of Virginia. On February 28, 2005, Defendants filed a Motion to Stay Discovery until the matter regarding their pending Motion for Bill of Particulars had been resolved. (Mot. to Stay Discovery P16).

On March 21, 2005, Plaintiffs filed a Response to Defendants' Motion to Stay Discovery in which they stated: "Plaintiffs are clearly alleging attacks on their rights to free speech and to petition the government, both of which are protected by the state and federal constitutions." (Pls.' Resp. Defs.' Mot. Stay Discovery at 3). However, the Plaintiffs did not articulate the factual or statutory predicate for which particular constitutional right or rights were involved that were asserted to form the basis for the alleged cause(s) of action. Id. The Plaintiffs also filed a Motion to Compel at the same time. The Motion to Stay Discovery [*6] was granted by the state court and the Plaintiffs' Motion to Compel was denied for the reason that the Defendants still required the clarification they requested in their Motion for Bill of Particulars in order to respond to the discovery demands. (Order of May 10, 2005). Thereafter, on May 19, 2005, Plaintiffs filed their First Amended Motion for Judgment which included, among other allegations, the first mention of *42 U.S.C. § 1983* that provides the vehicle for the Plaintiffs' *First Amendment* claim(s). (Compl. P12). The Defendants filed their Notice of Removal thereafter on May 24 pursuant to *28 U.S.C. § § 1441* and *1446*, basing removal on the Plaintiffs' assertion of a *§ 1983* claim in the First Amended Motion for Judgment. (Notice of Removal P8). Defendants thereupon filed the motion to dismiss and Plaintiffs filed the motion to remand, asserting that the notice of removal was not filed timely.

Analysis

Motion to Remand

The initial issue is whether the case was removed within the prescribed time period. A defendant in a civil action brought in state court may remove the action to federal court

if "the district courts of the United States have original jurisdiction . . . ." *28 U.S.C. § 1441(a)*, which includes, of course, actions "founded on a claim or right arising under the Constitution, treaties or laws of the United States . . . ." *28 U.S.C. § 1441(b)*.

The removal of an action from state court must be done in accordance with the procedures established by *28 U.S.C. § 1446*. The statute requires that notice of removal must "be filed within thirty days after the receipt . . . of the initial pleading setting forth the claim for relief . . . ." *28 U.S.C. § 1446(b)*. It further states that "if the case stated by the initial pleading is not removable, the notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise of a copy of an amended pleading, motion, order or other paper from which it may be first ascertained that the case is one which is or has become removable . . . ." Id. The jurisdictional requirements for removal are therefore precise and any defect will preclude removal. *Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994)* ("The burden of establishing federal jurisdiction is placed upon the party seeking removal. Because removal jurisdiction raises significant federalism concerns, [the court] must strictly construe removal jurisdiction. If federal jurisdiction is doubtful, a remand is necessary."). In determining when a removing party was put on sufficient notice for removal, a court may "rely on the face of the initial pleading and on the documents exchanged in the case by the parties," but the grounds must "be apparent within the four corners of the initial pleading or subsequent paper." *Lovern v. Gen'l Motors Corp., 121 F.3d 160, 162 (4th Cir. 1997)* ("Only where an initial pleading reveals a ground for removal will the defendant be bound to file a notice of removal within 30 days.").

Until the Plaintiffs filed the First Amended Motion for Judgment, the Defendants did not have sufficient notice of the assertion of a federal claim and, therefore, the case was not subject to removal. While the Plaintiffs argue that the initial Motion for Judgment asserts a federal *First Amendment* claim, pertinent language in the "Facts" section of the pleading only avers that Defendants allegedly retaliated against the Plaintiffs for their exercise of "state and federally protected *First Amendment* Speech." (Mot. for J. P11). The initial pleading thereby lacked a statement of which law, state or federal, the Plaintiffs asserted to be the basis for the claim. The ambiguity was highlighted by the filing of the Defendants' Motion for Bill of Particulars and in their Motion to Stay Discovery, the issue not being adequately addressed by the Plaintiffs until the submission of the First Amended Motion for Judgment. (Mot. for Bill of Particulars P5; Mot. for Stay of Discovery P16; Compl. P12). A simple comparison of the two Motions for Judgment illustrates the difference between a sufficient allegation of a claim based in federal law and a statement (as in the initial pleading) that contains, at best, ambiguous legal claims. Accordingly, where the Defendants filed the notice of removal within the prescribed time period after the Plaintiffs filed the first Amended Motion for Judgment on May 19, 2005, the notice was timely and it is therefore recommended that the Plaintiffs' Motion to Remand be denied.

Res Judicata

The only remaining issue that needs to be addressed for final resolution of the pending action is whether further pursuit of the asserted claims is barred by the doctrine of *res judicata.* n1 The issue arises because of the obvious similarity of the present case to that brought earlier by the same plaintiffs against nearly identical defendants. n2 *See*

Dogwood Realty, Inc. v. Goodwin, 2004 U.S. Dist. LEXIS 28906, No. 3:03cv271 (E.D.Va. Nov. 2, 2004). The facts alleged in the present action concerning the Defendants' alleged conduct that gives rise to the present claims are the same facts as those alleged in the previous case, though guised as a *First Amendment* claim rather than a *Fourteenth Amendment* claim, and notwithstanding the conclusory allegation that retaliatory acts of unspecified nature are ongoing. The demand for monetary relief is the same ($ 25,000,000), and the same six properties are at issue.

n1 Several additional defenses are raised by the Defendants, but they are rendered moot by the court's recommendation that the entire action be dismissed on the basis of *res judicata.*

n2 The only defendant in this case not involved in the previous case is Defendant Angela Rodgers-Reaves who is nevertheless an employee of the defendant state agency and therefore in privity, as further discussed later herein, with the same parties who were involved in the earlier litigation. (Pls.' Opp'n Mot. Dismiss at 9).

Plaintiffs initially assert that the doctrine of *res judicata* cannot be raised in a *12(b)(1)* or *12(b)(6)* motion to dismiss for failure to state a claim. (Pls.' Opp'n Mot. Dismiss at 4). However, the very authority relied on in part by Plaintiffs includes the holding that: "where allegations of a complaint give rise to an affirmative defense, the defense may be raised under *Rule 12(b)(6) . . . ." Richmond, F.&P. R.R. Co. v. Forst, 4 F.3d 244, 250 (4th Cir. 1993).* Moreover, there is additional authority supporting the conclusion that a motion

to dismiss is a proper vehicle to assert the affirmative defense of *res judicata. See, e.g., Thomas v. Consolidation Coal Co. (Pocahontas Fuel Co. Div.), 380 F.2d 69 (4th Cir. 1967)*; *Andrews v. Daw, 201 F.3d 521 (4th Cir. 2000)*. As specifically held in Thomas: "there is no dispute concerning the facts in this case which are relevant to the claim of *res judicata,*" and the matter is therefore properly presented in a motion to dismiss. *380 F.2d at 75*. Further, as the court held in *Briggs v. Newberry County Sch. Dist., 838 F.Supp. 232 (D.C. S.C. 1992)*:

Fed. R. Evid. 201 provides that a court shall take judicial notice of adjudicative facts when requested by a party and supplied with the necessary information, when the judicially noticed fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Facts subject to judicial notice may be considered by a court on a motion to dismiss. When entertaining a motion to dismiss on the ground of *res judicata* or collateral estoppel, a court may judicially notice facts from a prior judicial proceeding.

The record of the prior administrative and state court hearings in this case is a source whose accuracy cannot reasonably be questioned. Accordingly, this Court take judicial notice of the prior proceedings between the District and Plaintiff and, further, hereby considers those proceedings in ruling on Defendants' motion to dismiss.

838 F.Supp. at 233-234 (internal citations omitted) *aff'd, 1993 U.S. App. LEXIS 4884, 1993 WL 66558, at *2 (4th Cir. 1993)*(unpublished). The Plaintiffs' arguments that the issue cannot be addressed in the context of a motion to dismiss are therefore unavailing.

Under the doctrine of *res judicata,* a claim is barred when three elements are met:

> 1) the prior judgment was final and on the merits, and rendered by a court of competent jurisdiction in accordance with the requirements of due process; 2) the parties are identical, or in privity, in the two actions; and 3) the claims in the second matter are based upon the same cause of action involved in the earlier proceeding.

Pittston Co. v. United States, 199 F.3d 694, 704 (4th Cir. 1999) citing *In re Varat Enters., 81 F.3d 1310, 1315 (4th Cir. 1996)).*

Finality of prior judgment

The Plaintiffs argue that none of the three elements of *res judicata* are present in this case. First, they argue that the previous decision is not a final judgment on the merits because the alleged retaliation by the Defendants is "ongoing." (Pls.' Opp'n Mot. Dismiss at 7). However, besides that conclusory assertion, Plaintiffs have not specified any event or act that has taken place during the alleged ongoing retaliation; rather, they reassert the same events and actions that were the basis for the prior claim(s), including licensing

actions that had taken place before the first action was filed. Accordingly, the Plaintiffs cannot circumvent the doctrine of *res judicata* by simply asserting in totally conclusory terms that injuries are "ongoing."

Plaintiffs also assert that the dismissal ordered in the previous action is not a final judgment on the merits because it is currently on appeal. However, the Plaintiffs cite case authority that, in fact, does not support their position. (Pls.' Opp'n Mot. Dismiss at 7). Specifically, in *Warwick Corp. v. Maryland Dep't of Transp., 573 F. Supp. 1011, 1012 (D. Md. 1983)* the court held ". . . that a final judgment retains all of its *res judicata* consequences pending decision of the appeal . . . [.]" (Pls.' Opp'n Mot. Dismiss at 7).

Finally, the Plaintiffs' argue that the prior order is not a final judgment on the merits because Plaintiff Chaudhary was dismissed for lack of standing in that case. (Pls.' Opp'n Mot. Dismiss at 8.) Plaintiffs do not cite any law to support their contention that *res judicata* does not apply to a decision based on lack of standing. In addition, because this case alleges the same acts and injuries as in the prior case, Chaudhary still lacks standing because the alleged injuries involving licensing and enforcement issues affected Dogwood, not him, and he is not seeking damages for himself for the alleged violation of his personal constitutional right to free speech and/or petition. *Smith Setzer & Sons, Inc., et al. v. South Carolina Procurement Review Panel, 20 F.3d 1311, 1317 (4th Cir. 1994)*(holding that a sole shareholder does not have standing to assert claims alleging damage to the corporation); *accord Forest Ambulance Serv., Inc. v. Mercy Review Panel, 952 F.Supp. 296, 304 (E.D. Va. 1997)*(finding that shareholders lacked standing to bring a *§ 1983* action claiming injury to the corporation).

Identical parties or parties in privity

The Plaintiffs argue that the parties in this case are not identical or in privity with the parties in the previous action. The fact that Chaudhary's claims were dismissed in the prior action for lack of standing does not affect that element of *res judicata* because the dismissal for lack of standing is a final judgment on the merits and Chaudhary has not alleged a "new" injury to himself that was not in existence at the earlier juncture when the claim could have been pursued and which would otherwise confer him standing in this case.

Furthermore, the only new Defendant in this case is Angela Rodgers-Reaves. Under the Fourth Circuit's standard for "virtual representation" as a measure for evaluating the issue of whether there is privity sufficient to implicate *res judicata,* if Rodgers-Reaves' rights would have been represented using "precisely the same legal right" as the Defendants in the previous action, she is deemed to be in privity with those Defendants. *Martin v. American Bancorp Retirement Plan, 407 F.3d 643, 651 (4th Cir. 2005).* In Martin, the court enumerated three categories of non-parties who are in privity with parties to a prior action and thereby bound by the result of the prior litigation: "(1) a non-party who controls the original action; (2) a successor-in-interest to a prior party; and (3) a non-party whose interests were adequately represented by a party to the original action." Id. Rodgers-Reaves is a subordinate of one or more of the other Defendants in this case and all assert the exact same arguments that were pursued in the previous case, namely, that there was adequate justification for the denial and revocation of the subject licenses because of various regulatory violations at the facilities. The First Amended Motion for Judgment does not attribute any act or injury specifically to Rodgers-Reaves, but merely asserts that the

injuries were caused by the Defendants as a group. The Plaintiffs have not asserted any facts to demonstrate that Rodgers-Reaves' interests were not adequately represented in the prior litigation, or that she would defend herself under different legal theories than her co-defendants. Therefore, she is in privity with the prior litigants and her interests were adequately represented in the previous case which is sufficient to satisfy the second element of *res judicata.*

Same transaction or series of transactions

The Plaintiffs argue that because the *First Amendment* claim asserted in the present action was not decided in the previous action, the final element for application of *res judicata* is lacking. (Pls.' Opp'n Mot. Dismiss at 7). However, whether the claim was raised in the previous case is irrelevant; the relevant inquiry is whether the claim *could have been raised. Harnett v. Billman, 800 F.2d 1308, 1313 (4th Cir. 1986). Res judicata* will bar a claim if it "arises out of the same transaction or series of transactions as the claim resolved in the prior judgment." Id. In *Aliff v. Joy Mfg. Co., 914 F.2d 39 (4th Cir. 1990)*, the plaintiff sued the defendant on the theory of false representation in a commercial transaction. The plaintiff did not obtain all the relief it sought in the action and thereafter brought a subsequent suit for additional damages based on alternate theories of recovery under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"). The court held, in essence, that the CERCLA claim was barred by *res judicata* because it arose from the same set of facts that gave rise to the misrepresentation claim and that it therefore existed at the time of the initial trial. *Id. at 43.* Simply stated, the court held that *res judicata* applies even when a different

legal theory is pursued in the subsequent action as long as it emanates from the same basic transaction. Id.

The Plaintiffs here have offered nothing to show that their *First Amendment* claim did not exist at the time of the prior action. In fact, Plaintiffs remind the court that they did raise the issue, albeit too late, in the previous action. (Pls.' Opp'n Mot. Dismiss at 7). Accordingly, even though the court declined to address it then, the claim existed and could have been pursued. The Defendants, if forced to further litigate the issue, will use the same defenses as they did in response to Plaintiffs' previous claims that were predicated on the *Fourteenth Amendment*. Just as the plaintiff in Aliff was barred by *res judicata* from bringing its CERCLA claim, the Plaintiffs here are likewise barred from bringing the *First Amendment* claim(s).

Conclusion

Having found that all three elements of *res judicata* are present with respect to all claims, and that there is no genuine dispute of material fact relevant to the claim of *res judicata* left to be resolved, it is the conclusion of this court that the doctrine of *res judicata* requires dismissal of all counts against all Defendants. The Defendants timely filed their Notice of Removal after receiving adequate notice by the First Amended Motion for Judgment of the existence of federal question jurisdiction, and although there is one new Defendant in this case, and the present claim(s) are grounded on an alternate theory than in the previous action, the doctrine of *res judicata* bars the claim because the parties are identical or in privity, the facts that gave rise to the previous case are the same facts that give rise to this action, and the dispositive relief granted in the previous case constitutes a final adjudication on the merits of all claims asserted. For the

forgoing reasons, it is therefore recommended that the Plaintiffs' Motion to Remand be DENIED and that the Defendants Motion to Dismiss be GRANTED.

Let the Clerk forward a copy of this Report and Recommendation to the Honorable Henry E. Hudson and counsel of record.

It is so Ordered.

Dennis W. Dohnal

United States Magistrate Judge

Date: 8/9/05

APPENDIX E

INITIAL STATE PLEADING FILED IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND, VIRGINIA ON DECEMBER 6, 2002

VIRGINIA:
IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
John Marshall Courts Building

Nazier Chaudhary
and
Dogwood Realty, Inc.,
Plaintiffs,
v. Case No. LP 2931-4

Carolynne H. Stevens, individually and in her official capacity
Serve at: 730 East Broad Street
Richmond, Virginia 23219
and
Angela Rodgers-Reaves, individually and in her official capacity
Serve at 730 East Broad Street
Richmond, Virginia 23219
and

DeNyce Bonaparte, individually and in her official capacity
Serve at 730 East Broad Street
Richmond, Virginia 23219

and

COMMONWEALTH OF VIRGINIA,
Defendants.

MOTION FOR JUDGMENT

Comes now the plaintiffs Nazir Chaûdhary and Dogwood Realty, Inc., by counsel, and moves for judgment against Carolynne H. Stevens, Angela Rodgers-Reaves and DeNyce Bonaparte, all individually and in their official capacities for the Department of Social Services for the Commonwealth of Virginia, and the Commonwealth of Virginia, jointly and severally, on the grounds and for the reasons more fully stated below:

FACTS

1. Nazir Chaudhary, M.D., ("Chaudhary") is a resident of Virginia and citizen of the United States. Dogwood Realty, Inc. is a Virginia corporation which operated assisted living facilities in Virginia.
2. Defendants Carolynne H. Stevens, Angela Rodgers-Reaves and DeNyce Bonaparte, (collectively "actors") each acted individually and in their official capacities for the Department of Social Services for the Commonwealth of Virginia.
3. Defendant Agnela Rodgers-Reaves caused to be published and defendant actors caused to be re-published to third persons false and defamatory statements injuring the reputation of plaintiffs and resulting in damages to plaintiffs, including but not limited to allegations of violations of standards, many of the factual statements being completely fabricated, including but not limited to statements related to

Warsaw Village Retirement Center that citing as violations (a) "Resident # 1 - No physical in file," when the physical was in the resident's chart; (b) "No resident agreement on file for residents 1,2, 3 & 4," when the resident agreements were on file in the office and available had the defendants bothered to inspect them; (c) "No social data on resident #1", when the social data was in the file inspected by defendants; (d) "No financial agreement on file for resident # 1, 2, 3, & 4", when the agreements were in the office and available had the defendants bothered to inspect them; (e) "No documentation to show personal representative of resident notified or copied # 1 & 2", when the documents were in the office and available had the defendants bothered to inspect them; (f) citation as a violation "No service plan for resident #2 & 3" when the facility had 45 days to complete; (h) "Couch in hallway leading to dinning room stained", when in fact the couch was not stained; and (i) "Couch in hallway leading to dining room smelled of urine", when in fact the couch was neither stained nor smelled of urine. Some of these defamatory statements were re-published to reporters and on December 12, 2001 in the Northern Neck News. The republication or repetition therof by third persons is the natural and probable consequence of defendant actors actions or have presumptively or actually authorized or directed the republication.

4. Defendants acted without good faith.

5. Defendants acted out of common-law malice, in that their behavior was actuated by motives of personal spite, or ill-will, independent of the occasion on which the communication was made.

6. The defendants knew the statements were false or made them with reckless disregard of whether they were false or not.

7. The statements were unnecessarily insulting.
8. The language used was stronger or more violent than was necessary under the circumstances.
9. The statements were made because of hatred, ill will or a desire to hurt the plaintiff rather than as a fair comment on the subject.
10. Defendants conspired to injure plaintiffs in their businesses.
11. Defendants retaliated against plaintiffs for the exercise of state and federally protected First Amendment Speech, and for petitioning the government, including but not limited to his correspondence to the Governor of Virginia dated January 6, 2000 and February 21, 2000 and April 10, 2000, calling attention to problems with the Virginia Department of Social Services; by inter alia, subjecting defendants to increased scrutiny, fabrications, and denial and revocation of licenses, and by timing said actions in such a fashion that made it difficult for plaintiffs to transfer clients to other facilities.
12. As a result of the criticism defendants conspired and colluded to injure plaintiffs in their businesses.
13. As a result of the defendants actions, numerous assisted living facilities owned or operated by plaintiff(s) were not licensed or the licenses were revoked damaging plaintiffs.

COUNT 1

DEFAMATION/LIBEL

14. Paragraphs 1 - 13 are repeated herein.

WHEREFORE plaintiffs demands judgment, jointly and severally in the amount of $25 Million, plus costs, prejudgement interest, interest and attorneys fees together with any other relief that is appropriate.

COUNT 2

STATUTORY CONSPIRACY

15. Paragraphs 1 - 13 are repeated herein.

WHEREFORE plaintiffs demands judgment, jointly and severally in the amount of $25 Million, plus costs, prejudgement interest, interest and attorneys fees together with any other relief that is appropriate.

COUNT 3

CIVIL RIGHTS VIOLATION

16. Paragraphs 1 - 13 are repeated herein.

WHEREFORE plaintiffs demands judgment, jointly and severally in the amount of $25 Million, plus costs, prejudgement interest, interest and attorneys fees together with any other relief that is appropriate.

COUNT 4

VIRGINIA ARTICLE 1 § 12 CIVIL RIGHTS VIOLATION

17. Paragraphs 1 - 13 are repeated herein.

18. The conduct of the defendants violates plaintiffs freedom of speech and the right to petition, and constitutes unlawful retaliation for the exercise of that right in violation of the Virginia Constitution, Article 1 § 12 which provides as follows: "Freedom of speech and of the press; right peaceably to assemble, and to petition. That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances."

WHEREFORE plaintiffs demands judgment, jointly and severally in the amount of $25 Million, plus costs, prejudgement interest, interest and attorneys fees together with any other relief that is appropriate.

Nazier Chaudhary

and

Dogwood Realty, Inc.

By: /s/ Thomas H. Roberts
Counsel

Thomas H. Roberts, Esq.
VSB 26014
Thomas H. Roberts & Associates, P.C.
Virginia's Civil Rights Attorneys
105 South 1st Street
Richmond, Virginia 23219
Telephone: (804) 783-2000
Facsimile:(804) 783-2105

APPENDIX F

28 U.S.C. § 1446

28 U.S.C. § 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)

(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.
(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.
(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act